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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 663.

DAVID H. RIDDLE, *Appellant*,

vs.

JAMES E. DYCHE, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GEORGIA.

BRIEF IN BEHALF OF APPELLANT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF IN BEHALF OF APPELLANT.

I.

STATEMENT OF THE CASE.

In the District Court of the United States for the Eastern Division of the Northern District of Alabama, at the Fall Term, 1919, thereof, appellant and six others were indicted for violating Sections 215 and 37 of the United States Federal Penal Code, the violation of each of which sections is an infamous offense.

The indictment came on for trial August 16, 1920, and the defendants severally pleaded not guilty.

To try the defendants, eleven persons and no more were called and sworn as pretended jurors, and the same sat throughout the trial, and at its conclusion rendered a verdict, so-called, of guilty on certain counts of the indictment (R. *passim*); and thereupon appellant was sentenced, as it is said, to the penitentiary at Atlanta, Georgia, wherein he is now confined.

The swearing of the said eleven persons to try the indictment was by understanding and agreement of counsel for the United States and the defendants, with the concurrence and consent of the latter, orally only and not made matter of record, and because at the time and place of trial there were present, qualified and conveniently available as jurors for the purpose, only the said eleven persons. (R. 2, f. 3.)

At the conclusion of the trial, an Assistant United States Attorney, who participated therein, prepared the minute of the so-called verdict to be entered in the case, because the deputy clerk on duty "said she did not know how to prepare it in keeping with the law" (R. 51, f. 74); and this minute, typewritten, recited "that there were eleven jurors who returned the so-called verdict in the case" (R. 50, f. 74), "contained a recital of the coming of these eleven men by name" (R. 52, f. 76). This minute was sent by the Assistant District Attorney to the deputy clerk (R. 51, f. 74), and was seen in the clerk's office by counsel for one of the defendants. It "recited the rendition of the verdict, naming the eleven men, individually by their names, as jurors who had rendered this verdict of guilty." (R. 49-50, f. 73).

The Assistant District Attorney told the Judge who had presided at the trial about this minute, and the Judge "said 'That is not my entry,' or in substance,"

whereupon under direction of the Judge the Assistant District Attorney prepared another draft, in the language appearing in the record (R. 51-2, ff. 75-6). The first draft was returned to the Assistant District Attorney, who tore it up. (R. 52, f. 76.)

The recital in the record is in these words:

> "To try this cause come a jury of good and lawful men duly impanelled, sworn and charged a true verdict to render according to the law and the evidence." (R. 26, f. 38.)

On September 15, 1920, on condition of defendants agreeing to transfer the cause and submit it to be tried by the Circuit Court of Appeals at such time after February 1, 1921, as the same might be set down for trial by that court (R. 56), the time for signing and filing a bill of exceptions in the case was extended to and including December 1, 1920 (R. 57, ff. 80-1).

On October 26, 1920, appellant moved to amend the entry respecting the jury, so that the same should show that but eleven men, and not twelve, sat as jurors in the case (R. 44, f. 66; R. 54-5, ff. 78-9), offered to prove by sundry witnesses the "fact that eleven jurors, and eleven only, sat on that case and tried and rendered the verdict which then appeared on file and on which the judgment was based" (R. 45, f. 66), and "stated in open court that he expected the answers of each of the witnesses to show that only eleven men sat" (R. 45, f. 67); but, on the "ground that parol testimony was not admissible for the purpose of varying or modifying or amending the record," and on that ground only, the Court refused to admit the proffered testimony (*ibid*), and ruled as follows (italics supplied):

> "The Court, *after hearing the evidence* and argument of counsel for the movant, being of the opinion that the record of the judgment entry is *as it should be*, and does not need amendment, and that the motion is not well taken,
>
> "It is ordered and adjudged by the Court that said motion be and is hereby denied; and the movant excepts to the ruling of the Court in this behalf." (R. 58-9, f. 82.)

At the same time appellant made a motion to quash and set aside the judgment, on substantially the same grounds (R. 53-4, ff. 77-8), and like action was had thereon. (R. 59, f. 83.)

Subsequently, on November 12, 1920, on application for a further extension of the time for settling the bill of exceptions, the Court made the following order (italics supplied):

> "In this cause, for good cause shown, it is ordered that the time for presenting and filing the bill of exceptions embracing all matters excepted to prior to the time of the order and agreement of extension heretofore made and entered into, *but not affecting any exception taken in said cause after the original order and agreement of extension was made and entered into; this order not applying to any such subsequent exceptions*, be and it is hereby extended to and including the first day of January, 1921; subject to the condition that the defendant D. H. Riddle consent to the submission of the writ of error as provided in the original agreement of extension (R. 57, f. 81).

As required, appellant consented to the submission of the writ of error at the time prescribed (R. 58, f.

82), but when his bill of exceptions was presented the Court was asked, and refused to incorporate therein the proceedings aforesaid respecting the motions to amend the record and to quash and set aside the judgment (R. 45, f. 67), and the record on the writ of error did not contain any of the matters pertaining thereto (R. 45-6, f. 68); but through inadvertence that record did contain two assignments of error (113 and 114, R. 53-5, ff. 77-9), which had been prepared in anticipation that the matters rejected by the Court would be included in the bill of exceptions, but were not eliminated when those matters were excluded (R. 46, f. 68).

Following the action of the trial Court denying his motion to amend the entry respecting the jury, appellant applied to this Court for the writ of mandamus to require the trial Court to make the desired correction, which application was denied, upon the ground that appellant might have saved the point by an exception at the trial or by a bill of exceptions and then have brought a writ of error; in other words, upon the ground that he had mistaken his remedy.

Exp. Riddle, 255 U. S. 450.

On July 7, 1922, appellant, then being in the penitentiary at Atlanta under the supposed sentence pronounced against him in the premises, sued out in the District Court of the United States for the Northern District of Georgia a writ of *habeas corpus*, which was duly issued (R. 1-6), and after hearing thereof he was remanded to the custody of the warden (R. 37-8, f. 57), upon the ground that the matter of the petition was settled, first, by the law making it only an error, not a nullity, to try a case by a panel of eleven jurors, and,

secondly, because it had been adjudicated by the motion before the trial Judge (R. 66, f. 89).

From this action of the Court the present appeal was taken (R. 41-2, f. 62).

II.

ASSIGNMENTS OF ERROR.

The Court below erred as follows:

1. In not holding that the pretended trial of petitioner by the Judge of the District Court of the United States for the Eastern Division of the Northern District of Alabama (hereinafter for convenience called "Alabama District Court") and eleven persons only, as and for a jury, was and is a nullity, as in conflict with and contrary to the provision of paragraph 3 of Section 2 of Article III of the Constitution of the United States, that the trial of all crimes, except in cases of impeachment, shall be by jury.

2. In not holding that the said pretended trial in manner aforesaid was and is a nullity, as in conflict with and contrary to the provision of Article VI of the Amendments to the said Constitution that in all criminal cases the accused shall enjoy the right to a trial by an impartial jury of the State and District wherein the crime shall have been committed.

3. In not holding that the report or finding (hereinafter for convenience called "pretended verdict") of the eleven persons aforesaid on the pretended trial aforesaid was and is not the verdict of a jury as contemplated and intended by the said provision of paragraph 3 of Section 2 of Article III of the Constitution aforesaid.

4. In not holding that the said pretended verdict was and is not a verdict as aforesaid as contemplated and intended by the said provision of Article VI of the Amendments aforesaid.

5. In not holding that upon and by the supposed impanelment of the said eleven persons only, as and for a jury, for the pretended trial of petitioner aforesaid, and the attempted trial of petitioner therewith in and by the said Alabama District Court, the jurisdiction of the said Court to try petitioner on the indictment against him therein pending ceased and was lost for the time being, and that such the attempted trial of petitioner was *coram non judice*, null, void and of none effect.

6. In not holding that from and after the supposed impanelment of the said eleven persons only as aforesaid, and the attempted trial of petitioner therewith by the Judge of the said Alabama District Court, all the proceedings in the said Court against petitioner on the indictment aforesaid were *coram non judice*, null, void and of none effect.

7. In not holding that the pretended judgment of the said Alabama District Court based upon the pretended verdict aforesaid, by reason of which pretended judgment petitioner was and is detained and restrained of his liberty, was, and is, and ever has been, null, void and of none effect.

8. In not holding that the pretended record of the said Alabama District Court, so far as the same recites, or purports so to do, that to try petitioner on the indictment aforesaid came a jury of good and lawful men, duly impaneled, sworn and charged, was and is false.

9. In holding that upon his petition herein petitioner was and is precluded from proving that, as the fact is, the said record was and is false as aforesaid, for that there did not come to try petitioner as aforesaid a jury as aforesaid, and for that he was undertaken to be tried, and was tried, if at all, by the eleven persons only as aforesaid.

10. In holding that by his motion in and to the said Alabama District Court to amend the pretended record aforesaid by causing the same to conform to the truth and to show, as the fact was and is, that to try him there did not come a jury as aforesaid but only the eleven persons aforesaid, and by the pretended judgment of the said Court upon his said motion, petitioner was and is precluded herein from contending and showing that the said pretended record was and is false as aforesaid.

11. In holding that by his motion in and to the said Alabama District Court to set aside and vacate the pretended judgment of the said Court by reason of which, as aforesaid he is detained and restrained of his liberty, and by the pretended judgment of the said Court upon his said motion, petitioner was and is precluded herein from contending and showing, that the said pretended judgment first aforesaid was and is null, void and of none effect.

12. In not holding that the said Alabama District Court was without jurisdiction to render the pretended judgment aforesaid by reason of which petitioner is detained and restrained of his liberty as aforesaid.

13. In holding that by reason of anything herein appearing petitioner was and is precluded from con-

tending and showing that the said Alabama District Court was without jurisdiction as aforesaid.

14. In holding that the issues presented and appearing herein have heretofore so been adjudicated against petitioner that the same might and may not be heard and determined herein.

15. In not granting petitioner the relief herein prayed.

16. In denying petitioner such relief.

17. In discharging petitioner's writ of *habeas corpus* and remanding him to the custody of respondent.

18. In not discharging petitioner from custody and not releasing him from detention and the restraint of his liberty as in and by his petition herein prayed.

19. The Court erred in not holding and adjudging that under the uncontroverted evidence the Government and said Warden, respectively, were and are estopped from asserting or claiming, on the trial of this petition that petitioner could have, or should have, obtained the relief sought on the motions to amend the judgment, or to set aside the judgment, filed by petitioner in the United States District Court for the Eastern Division of the Northern District of Alabama, and in not holding that the said Dyche, as such Warden, was and is estopped from asserting or claiming that the invalidity or error of the judgment complained of could or should have been taken advantage of by appeal or writ of error.

20. The Court erred in holding that the petitioner is concluded from obtaining the relief sought for and on account of the judgment of the trial court on October 26, 1920, in overruling and denying petitioner's motion to amend or correct the judgment entry in said cause.

21. The Court erred in holding that petitioner is

concluded from obtaining the relief sought for and on account of the judgment of the trial court on October 26, 1920, in overruling and denying petitioner's motion to set aside and vacate the pretended judgment entry in said cause.

22. The Court erred in holding that petitioner is concluded from obtaining the relief sought for and on account of the judgment of the trial court on October 26, 1920, in overruling and denying petitioner's motions to amend and correct the pretended judgment entry in said cause, and to set aside and vacate said pretended judgment entry.

These assignments of error may be thus compressed. The Court erred as follows:

1. In not holding that appellant was illegally tried, in that he was tried by eleven instead of twelve men as a jury; and this notwithstanding that he consented thereto.

2. In not holding that the pretended judgment of the Court upon the finding of the said eleven men was and is a nullity and not merely error.

3. In not holding that appellant is entitled on *habeas corpus* to be released of and from the effect of the said supposed judgment and to be discharged accordingly from custody thereunder.

4. In holding that the matter of appellant's petition is *res judicata.*

The substance of the matters thus presented is for convenience expressed in the proposition hereinafter argued.

III.

ARGUMENT.

Proposition: Appellant was illegally tried; the judgment against him is void; even though he may have neglected to avail himself of any other remedy open to him, or may have mistaken his remedy, he is entitled to relief on *habeas corpus;* under that writ all jurisdictional matters, whether or not appearing upon the record, may be inquired into; and, the matter is not *res judicata.*

1. Appellant was illegally tried.

A jury means twelve, no more, no fewer; diminishing the number impairs the right to trial by jury; the number can not be reduced by consent; and the finding of any other number than twelve is not a verdict upon which judgment can be pronounced.

16 R. C. L. 181 (2); 219 (36); 221-2 (36, 37, 38), and cases cited.

That in the case of trial for an infamous offense a jury of twelve men is the only legally constituted tribunal, and that neither prosecutor nor accused can by waiver or consent constitute a less number as such tribunal, is the declared law of this, and, with few exceptions, every other court in the land.

Cooley, Const. Lims. (7th Ed.) 455, 575;
Hopt v. Utah, 110 U. S. 574, 579;
Thompson v. Utah, 170 U. S. 343, 353-5;
Capital Traction Co. v. Hof, 174 U. S. 1;
Cancemi v. Peo., 18 N. Y. 128;
Peo. v. Cosmo, 205 N. Y. 91;
State v. Almy, 67 N. H. 274; 22 L. R. A. 744;

State v. Gerry, 68 N. H. 495; 38 L. R. A. 228;
Works v. State, 2 Oh. St. 296; 59 Am. Dec. 671 and note;
Harris v. Peo., 128 Ill. 585, 591;
Jennings v. State, 134 Wis. 307; 14 L. R. A. (N. S.) 862;
State v. Hamey, 168 Mo. 167; 57 L. R. A. 846;
Michaelson v. Beemer, 72 Neb. 761; 9 Anno. Cas. 1181;
Carpenter v. State, 4 How. (Miss.) 163;
Scott v. State, 70 Miss. 247;
Jones v. State, 52 Tex. Cr. 303;
State v. Ned. 105 La. 696; 54 L. R. A. 933;
State v. Rogers, 162 N. C. 656; 46 L. R. A. (N. S.) 38 and note;
Territory v. Ah Wah, 4 Mont. 149;
Queenan v. Territory, 11 Okla. 261; 61 L. R. A. 324;
In re McQuown, 19 Okla., 347; 11 L. R. A. (N. S.) 1136 and note.

And when appellant's case was before this Court at its October Term, 1920, on his application for the writ of mandamus as aforesaid, the Court in its opinion used this decisive language (italics supplied):

> "The petitioner was indicted for a violation of Section 215 of the Criminal Code of the United States by a use of the mails in furtherance of a scheme to defraud. This is a felony, Section 235, *and therefore, we assume, must be tried by a jury of twelve.*"
>
> Exp. Riddle, 255 U. S. 450.

The learned Judge of the Court below cited two decisions of this Court in supposed support of the contrary conclusion reached by him, namely, Exp. Belt. 159 U. S. 95, and Schick v. United States, 195 U. S.

65. The briefest examination of these cases will show their utter irrelevancy in the premises.

The case of Belt is this: In 1893 Belt was tried in the Police Court of the District of Columbia for larceny. At the trial, in accordance with the provision of the Act of Congress of July 23, 1892 (27 Stat. L. 261), in that behalf, that in prosecutions in the Police Court of the District in which according to the Constitution the accused would be entitled to a jury trial, the accused might in open court expressly waive such trial by jury and request to be tried by the Judge, in which case the trial should be by the Judge, Belt waived the right of trial by jury, submitted to be tried by the Judge, and was found guilty. Subsequently, in 1894, he was charged in the Supreme Court of the District of Columbia with a second offense of larceny, and the record in the former case was offered as evidence of his first offense. To the introduction of this record in evidence objection was made on the ground that on its face it showed a waiver of the right of trial by jury and a trial and conviction by the court alone, which was claimed to be in violation of the Constitution of the United States and therefore null and void. The objection was overruled and exception taken, and on appeal this ruling was sustained by the Court of Appeals of the District. Belt v. United States, 4 App. D. C. 25.

Thereupon, Belt applied to this Court for leave to file a petition for the writ of *habeas corpus*, upon the ground that the sentence as for a second offense under which he was held was void, because his first conviction was void and of none effect in law, inasmuch as the Constitutional requirement of trial by jury in criminal cases could not be waived by an accused

though in pursuance of a statute authorizing such waiver.

The Supreme Court of the District of Columbia held that the Act of Congress authorizing the waiver of a jury in the Police Court was valid, and the Court of Appeals affirmed this holding.

In dealing with the case this Court stated the question involved as follows (p. 97):

> "Does the ground of this application [for leave to file the petition for the writ of habeas corpus] go to the jurisdiction or authority of the Supreme Court of the District, or, rather, is it not an allegation of mere error? If the latter, it can not be reviewed in this proceeding."

The Court disposed of the question thus (pp. 99-100):

> "Without in the least suggesting a doubt as to the efficacy, value and importance of the system of trial by jury in criminal cases as well as in civil actions, we are clearly of opinion that the Supreme Court of the District had jurisdiction and authority to determine the validity of the act which authorized the waiver of a jury and to dispose of the question as to whether the record of a conviction before a judge without a jury, where the prisoner waived trial by jury according to statute, was legitimate proof of a first offense, and this being so, we can not review the action of that Court and the Court of Appeals in this particular on habeas corpus."

This, and this only, is the decision of this Court in the Belt case; and although the case was thus disposed of upon the single ground stated, namely, that the writ

of *habeas corpus* may not be used to perform the office of a writ of error or appeal, it is interesting to note the following language of the Court in its opinion (p. 100):

> "The general rule is that the writ of habeas corpus will not issue unless the Court under whose warrant the petitioner is held is without jurisdiction, and that it can not be used to correct errors. Ordinarily the writ will not lie where there is a remedy by writ of error or appeal; *but in rare and exceptional cases it may be issued although such remedy exists.*" (Italics supplied.)

The case of Schick is this: Schick was proceeded against by information in a District Court of the United States under the Act of Congress of August 2, 1888 (24 Stat. L. 209), imposing a penalty of $50 for the knowing purchase or receipt for sale of oleomargarine not branded or stamped according to law, and waiving trial by jury he was tried by the Court and found guilty.

On writ of error this Court held that the Constitutional provision that "the trial of all crimes, except in cases of impeachment, shall be by jury" does not include such petty offenses, and there is no Congressional legislation or rule of public policy requiring a jury in such cases.

In a dissenting opinion, characteristic of its writer, Mr. Justice Harlan held that, as the offense charged was a crime against the United States and the Constitutional provision applies to *all* crimes, petty or other, Schick's conviction could not be sustained; saying (p. 100) that (1) as the offense charged was a crime against the United States, (2) as the Constitution expressly declares without qualification that the trial of

all crimes, except impeachment, shall be by a jury, (3) as Congress had not assumed to declare that the case and like ones might be tried without a jury, the parties assenting, and (4) as the trial of the case by the Court alone, without a jury, had no other sanction than the consent of the accused and the District Attorney, the judgment should be reversed.

Of this opinion the learned Judge of the Court below said (R. 62, f. 86):

> "Judge Harlan dissented very vigorously, citing the case in 170th [Thompson v. Utah, 170 U. S. 343], and the whole line of authorities read here, that a jury was not a jury if it consisted of less than twelve nor could be waived entirely. The majority of the Court cited contra the case from Massachusetts, one from Ohio and *eight or ten others which have taken the contrary view even in felony cases.* The Massachusetts case held a jury of eleven men might try if waiver was made by defendant. That case was cited with approval by a majority of the Court against the dissent of Judge Harlan, and this really unsettles my mind considerably as to what the Court would hold now in the case of express waiver." (Italics supplied.)

On this it suffices to remark, first, that on the point under consideration the majority opinion cites but seven cases in all, of which but one is mentioned as a case of felony, and secondly, that in the instant case itself this Court said that the offense charged is a felony, "and therefore, we assume, *must be tried by a jury of twelve,*" (Exp. Riddle, 255 U. S. 450); which, being the latest utterance of this Court on the subject, would seem sufficient to settle any mind "as

to what the Court would hold now in case of express waiver."

Very clearly, neither the Belt case nor the Schick case appears to have any relevancy in the premises; and, equally clearly, the learned Court erred in saying (R. 66, f. 89) that it is only an error, not a nullity, to try a case of felony by a panel of eleven jurors.

A brief notice of the seven cases cited in the Schick case as above mentioned is not without interest.

Each of Com. v. Dailey and Murphy v. Com. was a case of misdemeanor in which a jury of twelve was sworn and one withdrawn during the trial. Tyra v. Com. was a case in which the charge was of felony, but the conviction of misdemeanor. In that case also a jury of twelve was sworn and one withdrawn during the trial, the Court relying upon the preceding case of Murphy v. Com., but adding:

> "If, as contended, the record presents a case of felony and not of misdemeanor, it follows that according to section 334 of the Criminal Code the error complained of is not such as to authorize this Court to reverse the judgment of conviction, especially as no such objection was made in the Court below."

In Connolly v. State, the statute permitting trial without a jury was specifically held to be clearly in the contemplation of the State constitution.

In Peo. v. Rathbun, the defendant consented only to the substitution of the Court for triors upon challeges of jurors. And State v. Worden is particularly interesting, as witness the following from the Court's opinion (italics supplied):

"The statute * * provides that 'in all criminal causes * * the party accused may, if he shall so elect, when called upon to plead, be tried by the court instead of by the jury * *.'

"It is now claimed that that statute is in conflict with the Constitution.

"There are two clauses * * which bear upon this subject. The first is found in the 9th section * *. As this section is not much relied upon we pass to consider the 21st section, which reads, 'The right of trial by jury shall remain inviolate.'

"Compared with this language the statute would seem to be in perfect harmony with it. The *right* to a jury trial remained to the prisoner. He was not deprived of it, but voluntarily relinquished it" (pp. 363-4).

"We find in the Constitution of the United States, which was in force when our Constitution was framed, the *explicit* provision 'The trial of all crimes, except in cases of impeachment, *shall be* by jury.' It would have been easy for our convention to be equally explicit. The fact that the *interests of the public* in this regard were not expressly provided for furnishes a strong presumption that it was not intended *to place the matter beyond legislative control. With the Constitution of the United States before the convention, the omission is significant*" (p. 366).

2. The judgment under which appellant is confined is void, and not merely voidable.

Elliott v. Piersol, 1 Pet. 328;
Peo. *ex rel* Tweed v. Liscomb, 60 N. Y. 559, 568;
Exp. Degener, 30 Tex. App. 566, 567 and cases cited;
Harris v. Peo., 128 Ill. 585;
87 A. S. R. 173, note, and cases cited;
Scott v. State, 70 Miss. 247.

3. In every such case relief may be had by *habeas corpus*, and the court may under the writ look to the judgment under which the petitioner is detained to ascertain whether it be absolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning or because it was lost in the course of the proceedings; and in so doing the court issuing the writ may look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the petitioner has been deprived of his liberty without due process of law, and for this purpose may inquire into jurisdictional facts, whether they appear upon the record or not.

Frank v. Mangum, 237 U. S. 309, 327, 331;
Exp. Wilson, 114 U. S. 417;
Neilsen, Petr., 131 U. S. 176.

4. It matters not that the petitioner may have, or have had, a remedy by appeal, or may have neglected or mistaken his remedy otherwise: in every case of unlawful detention the remedy by *habeas corpus* is of absolute right.

Peo. *ex. rel* Tweed v. Liscomb, 60 N. Y. 559;
In re Permstick, 3 Wash. 672, 674-5;
Exp. Thamm, 10 Mo. App. 595;
Com. v. Keeper of Phila. Prison, 41 Leg. Int. 94;
In re Jarvis, 66 Kans. 329;
In re Gribben, 5 Okla. 379;
Exp. Koerner, 176 Fed. 478;
State v. Dist. Ct., 35 Mont., 321;
Re Neff, 197 U. S. 488;
Re James Lincoln, 202 U. S. 178;
Stevens v. McClaughry, 207 Fed. 18; 125 C. C. A. 102; 51 L. R. A. (N. S.) 390.

In the case last cited the opinion is by Sanborn, Circuit Judge, and characteristically full and lucid, as witness the following therefrom:

> "And here is the true distinction between the cases in which the writ of *habeas corpus* may and those in which it may not issue. If the judgment or sentence challenged is without the jurisdiction of the court and void, the writ may issue. If it is erroneous, but within the jurisdiction of the court which rendered it, the writ may not issue. The parallel between the cases of Snow [120 U. S. 274] and Nielsen [131 U. S. 176] and the case at bar is complete, and unless the decision in the case of Spencer and others [228 U. S. 653] has overruled the cases which have just been reviewed, and departed from the fundamental principles they sustain and the practice under them which has prevailed for years in Re Mayfield, 141 U. S. 107, 116, 35 L. ed. 635, 638, 11 Sup. Ct. Rep. 939; Re Ladd (C. C.) 74 Fed. 31, 42; Re Waite (D. C.) 81 Fed. 359, 362, 372; Mackey v. Miller, 62 C. C. A. 139, 126 Fed. 161, 163; Ex Parte Peeke (D. C.) 144 Fed. 1016,—there would seem to be no doubt of the power or duty of the court to issue the writ in the case in hand. We are not persuaded that it has overruled them, departed from the rules they maintain, or decided that everyone restrained of his liberty by a void judgment which he might have challenged by a writ of error, is barred of relief by means of the writ of *habeas corpus*. It has not expressly declared that those decisions are wrong, or that the principles on which they rest are erroneous, and they are too firmly established to be overthrown by silence. On the other hand, it has carefully distinguished the leading case, the Lange Case, from those in which its opinion was delivered, and to hold that one who is being deprived of his liberty for a long term

of years by virtue of a sentence beyond the jurisdiction of the court which rendered it has deprived himself of his right to relief by writ of *habeas corpus*, because through ignorance, poverty, or neglect he failed to challenge that judgment by writ of error until it was too late, is to rob the writ of the very purpose of its existence,—the purpose to afford speedy and inexpensive relief from unlawful imprisonment to those otherwise remediless. To us it is incredible that the Supreme Court ever intended to decide, to take the striking illustrations of Mr. Justice Miller in Ex Parte Lange, 18 Wall. at page 176, 21 L. ed. 878, that one who should be sentenced by a justice of the peace having jurisdiction of fine for a misdemeanor, or by a court of general jurisdiction on an indictment for a libel, to imprisonment and death, who through ignorance or neglect should fail to appeal or procure a writ of error within the prescribed time, would be barred of relief by the writ of *habeas corpus*. It is a writ of right. The acts of Congress declare that the court to which the application for it is made 'shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto,' and 'shall proceed in a summary way to determine the facts of the case, * * * and thereupon to dispose of the party as law and justice require.' Revised Statutes, Secs. 775, 761, U. S. Comp. Stat. 1901, pp. 593, 594. The petitioner is being restrained of his liberty for five years by a judgment of a Federal court which was beyond its jurisdiction and void.

"And our conclusion is that one who is being restrained of his liberty for many years by virtue of the judgment of a Federal court which is beyond its jurisdiction and void, may and should be, relieved from that restraint by the proper Federal court by means of the writ of *habeas corpus*, and

> that he is not barred from such relief by the fact that he might have obtained it by a writ of error, but failed to do so until it was too late."
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> Stevens v. McClaughry, 207 Fed. 18, 125 C. C. A. 102; 51 L. R. A. (N. S.) 390, 397-8.

5. The learned Judge of the Court below was of opinion that appellant is precluded in the premises upon the ground that the basis of his application for discharge, namely, that he was tried by but eleven men instead of twelve, purporting to act as jurors in the case, is *res judicata*, the essential language of the Court's opinion in this regard being as follows (R. 64, f. 88):

> "One thing that I do rule is this, that really the question sought to be litigated on this *habeas corpus* has already been litigated, either before the trial Court or the reviewing Court. With a judgment rendered upon it, even though it involves the fact of jurisdiction, it becomes *res adjudicata*";

supplemented by the following, speaking of the Judge presiding at appellant's trial (R., 65, ff. 88-9):

> "in the exercise of the duty that rests on every Court to see that the record is true and if it is not true to make it true, he entertained a motion to correct his record. He had jurisdiction of that motion no matter whether he had lost it on the trial of the case when the jury was sworn or not. The case had started before him; he had tried it, unquestionably, as a Court, up to the point of swearing the jury, and there was a record necessarily to be made of what that Court was doing. It seems to me he had the right and had the duty of making a true record of that, and had jurisdic-

> tion to entertain the motion that was made before him. * * * The judgment was that that record was a correct record and needed no alteration but was as it should have been. * * * Whether right or wrong, it is settled, it is *res adjudicata* that *this record is right as respects this case.*" (Italics supplied.)

Too obviously for discussion, this involves the familiar logical fallacy *ignoratio elenchi.* The question is not what the record says but whether what it says is true, and on *habeas corpus* the latter is the crucial question. To this point the language of this Court in the case of Frank v. Mangum, *supra,* 237 U. S., 309, 331, is explicit:

> "That the due process of law guaranteed by the 14th Amendment has regard to substance of right, and not to matters of form or procedure; that it is open to the courts of the United States, upon an application for a writ of *habeas corpus,* to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not."

Very clearly, this means, if it means anything, that it makes no difference what the trial Court may have caused its record to recite as to jurisdictional facts, the Court having jurisdiction of the case on *habeas corpus* may and must in that proceeding ignore the record, no matter how made, and inquire into and ascertain the jurisdictional facts according to the truth: to hold otherwise would be to hold that, as is the plain truth in this case, by a falsification of the

record of his trial and the persistence of the trial court in maintaining that falsification, a citizen accused of crime and under imprisonment therefor may be deprived of his Constitutional right to have the legality of his imprisonment inquired into and determined according to the very truth of the matter.

Wherefore, while it may have been adjudged in this case by the trial court that the record should not be, and was not, amended, it remains as matter of truth that that record is false; and whether it be false or true is the very gist of the inquiry on *habeas corpus.*

An instructive case is that of General Investment Co. v. Lake Shore & M. S. R. Co., decided by this court at this term (No. 34), in which it was held that the overruling by a State court of a motion to set aside service of process on one of several defendants before removal of the cause to a Federal court does not preclude the latter court from examining and passing upon the question after the cause is removed into that court. True it is that in that case the State court's ruling was held to be purely interlocutory and its status in this regard not affected by the removal, and that being interlocutory the power of the State court to reconsider it passed with the cause to the Federal court; but in the instant case the power of the court below to consider the question could not arise until the case passed from the trial court, and the court below having its first opportunity to consider the case on the petition for *habeas corpus* could not then be denied its right or escape its duty to inquire into the case in accordance with the principle above stated, namely, for ascertainment of the jurisdictional facts whether appearing upon the record or not.

Counsel is not unmindful of the principle, nowhere more clearly stated than by this Court in the Frank case (p. 326), as follows:

> "Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by *habeas corpus*. That writ cannot be employed as a substitute for the writ of error."

But the office of a writ of error is to remove nothing for retrial but the law, and that for the purpose of reversing or modifying the judgment to which the writ is addressed: it is quite a different thing to ask relief, *the judgment notwithstanding*. What is sought in the instant case is not to reverse the judgment complained of, but to establish *dehors* the judgment and the record on which it professes to rest, matter, not of law but of fact, showing the want of jurisdiction in the court rendering the judgment; and it is exactly that which this Court has so plainly said may always be done under the writ of *habeas corpus* as now liberalized, "in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution" (Frank v. Mangum, *supra*, p. 331); and as is aptly said in Peo. v. Liscomb, *supra* p. 570, "If a process good in form issued upon a judgment of a court having jurisdiction, either general or limited, must in all cases be assumed to be valid until the judgment be reversed upon error, the remedy by writ of *habeas corpus* will be of but little value."

It being therefore the function of the writ to inquire, not into the judgment, but into that on which it pur-

ports to rest, and the object of the writ to have it adjudged that *notwithstanding the judgment,* the petitioner is, by reason of the circumstances in and under which it was rendered, deprived of his liberty through a violation of the Constitution, *res judicata* cannot be predicated of the decision of the court rendering the judgment that the record on which it rests "is as it should be" and will not be amended even to accord with the facts the existence of which show the court to have been without jurisdiction in the premises: the writ of *habeas corpus* is aimed not at the judgment but at its setting, and respecting the latter, no view of another court can hamper or otherwise affect the action of the court acting under the writ.

To repeat: the statement "that really the question sought to be litigated on this *habeas corpus* has already been litigated, either before the trial Court or the reviewing Court," is palpably fallacious.

As respects this question, the only matter before the trial Court was whether the record should be amended, and the decision of that Court was that it should not be corrected because it "*is as it should be, and does not need amendment.*"

Obviously, if this be a decision at all, it is a decision that the entry "To try this cause come a jury of good and lawful men, duly impanelled, sworn and charged a true verdict to render according to the law and the evidence," is such an entry as "should be" of a verdict rendered by eleven men and accordingly "does not need amendment:" this only, and nothing more. It is not a decision that twelve men tried the cause, nor is it a decision that a trial of the cause by eleven men was legal; but assuming it to be the latter, then very plainly it is a decision in direct conflict with and

defiance of the Constitution of the United States, in which case appellant's right to release on *habeas corpus* is undeniable, unless it be that this Court is to reverse itself and hold that it is not the Constitutional right of one accused of an infamous offense to be tried by a jury of twelve men and no fewer.

And as respects the suggestion that the question under consideration was litigated before the reviewing Court—presumably the Circuit Court of Appeals—it suffices to say that by the terms of the above-quoted order of November 12, 1920, further extending the time for settling the bill of exceptions, the question was industriously prevented from reaching the reviewing Court and was as industriously excluded from the bill of exceptions, as above shown. And of course if by "reviewing Court" this, the Supreme Court of the United States, could possibly be meant, it is necessary only to remark, what the Court of itself knows, that the matter was before it on application of appellant for the writ of mandamus to correct the record—and only to correct the record—and that this Court decided only that mandamus is not the proper remedy for such purpose.

As respects the doctrine under consideration and its application, it would be difficult, if not impossible, to find a more apt expression than the following of a former distinguished member of this Court:

> "In Smith v. Auld, 1 Pac. 626, 628, 31 Kan. 262, Mr. Justice Brewer, speaking for this court, said: 'The whole philosophy of the doctrine of *res adjudicata* is summed up in the simple statement that a matter once decided, is finally decided

and all the learning that has been bestowed and all the rules that have been laid down have been for the purpose of enforcing that one proposition. One rule fully established is that you may examine the entire record of the prior action in order to determine what was in fact adjudicated. The inquiry is not limited to the mere formal judgment. It extends to the pleadings, the verdict, or the findings; and the scope and meaning of the judgment is often interpreted by pleadings, verdict, or findings. Indeed, to determine the matters which are adjudicated, not only may you look to the entire record, but also, in many instances, you may resort to parol testimony.'"

Hoisington v. Brakey, 31 Kan. 560, 3 Pac. 353, 355.

And see, to the same effect:

Steam Packet Co. v. Sickles, 24 How. 333;
Cromwell v. Sac. County, 94 U. S. 351.

It stands accordingly that the case in the particular under discussion does not present the question of *res judicata*, and that consideration thereof by the Court below was wholly irrelevant in the premises.

Respectfully submitted,

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